IN THE

# Supreme Court of the United States

October Term, 1956

No. 34

WILLIAM J. KERNAN, Administrator of the Estate of Arthur E. Milan, Deceased, and JOHN J. MEEHAN, Administrator of the Estate of Donald H. Worrell, Deceased,

*Petitioners,*

*v.*

AMERICAN DREDGING COMPANY, as Owner of the Tug "Arthur N. Herron", In the Matter of the Petition for Exoneration from or Limitation of Liability,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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WILLIAM J. KERNAN, ADMINISTRATOR OF THE ESTATE OF ARTHUR E. MILAN, DECEASED, AND JOHN J. MEEHAN, ADMINISTRATOR OF THE ESTATE OF DONALD H. WORRELL, DECEASED,

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*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on July 5, 1956, and the order denying rehearing entered on August 13, 1956,

## OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 141 F. Supp. 582, and is printed infra, p. 15. The opinion of the Court of Appeals is reported in 235 F. 2d 618, and is printed infra, p. 25. The opinion of the Court of Appeals on the petition for rehearing is reported in 235 F. 2d 619, and is printed infra, p. 30.

## JURISDICTION.

The judgment of the Court of Appeals was entered on July 5, 1956, infra, p. 29. The order denying rehearing was entered on August 13, 1956, infra, p. 31. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

## QUESTIONS PRESENTED.

1. In an action based on the warranty of seaworthiness, is it necessary to show fault or knowledge on the part of the shipowner before liability can be imposed, or does liability attach under the warranty because the vessel or its equipment is *in fact* unsafe under the circumstances?

2. Where the breach of a regulation is the proximate cause of an injury, can a shipowner escape responsibility because the injury was not contemplated by the regulation?

## STATUTES INVOLVED.

These cases involve the Merchant Marine Act of 1920, popularly known as the Jones Act, 46 U. S. C. A. 688 (infra, p. 32), which incorporated into the maritime law, for the benefit of seamen, all statutes relating to railway employees. Also involved is the Coast Guard Regulation reported in the Federal Register Title 33, Chap. 1, Subchap. D, part 80.16(h) (infra, p. 33), which requires certain lights upon vessels to be carried at least eight feet above the water.

## STATEMENT OF THE CASE.

Two seamen were killed in a marine disaster in the Schuylkill River in Philadelphia on November 18, 1952. Respondent, the owner of the vessels involved, filed a petition in admiralty for exoneration from or limitation of liability in connection with that disaster. These proceedings stem from that litigation.

The Schuylkill River is a navigable waterway which empties into the Delaware River within the Port of Philadelphia. Along its banks are located a number of oil refineries where ocean going tankers dock to load and discharge inflammable petroleum products. Respondent was engaged in dredging the Schuylkill River at the docks of one of these refineries near Point Breeze in Philadelphia. In connection with this operation, it employed its tugboat, the "Arthur N. Herron" to tow the mud scows to a dumping ground several miles down the river. Along the banks of the river there were at least 3 large refineries and gasoline storage areas including the Atlantic Refining Company, the Esso and the Gulf Refining Companies. At the Gulf Plant on the date of the accident, there were seven ocean-going tankers moored to the spillways loading or discharging liquid petroleum. These vessels were displaying the required red electric lights as a warning signal to traffic on the river (App. 123). On the docks facing the river there were signs every fifty feet "prohibiting the use of naked lights and smoking" (App. 136).

The tug was under the command of an unlicensed master, Captain Taylor, and his crew consisted of one engineer, Milan, one oiler, Bagoski, two deckhands, Worrell and Harrington, and a cook, McGinley (App. 79-80).

Shortly after nine p.m. on the night of the accident the "Herron" took in tow a mud scow on its port side and proceeded down the river. The scow had about 2½ to 3 feet of freeboard. On its bow and stern there were placed

open flame kerosene lanterns not more than 3 feet above the water (App. 91). After the tug entered the area of the Gulf Refining Plant and was approaching the spillways where the tankers were loading and unloading petroleum, Captain Taylor left the bridge and went below for a cup of coffee, leaving the deckhand Worrell alone and in sole charge of the bridge (App. 98). At that time the captain himself detected a strong odor of gasoline in the air (App. 95-96). Shortly thereafter a ribbon of flame was observed along the port side of the mud scow starting near the kerosene lamp, and within a matter of seconds the river all around the tug and scow was ablaze (App. 152, 165). There was no fire between the scow and the tug (App. 174). For about *one minute* Captain Taylor stood transfixed on the deck without taking any action (App. 103). He then entered the engineroom with the deckhand Harrington immediately behind him, and he ordered all of the hatches closed and the engines stopped (App. 100).[1] He made no effort to reach the cook McGinley, who was asleep in his cabin (App. 101), nor Worrell whom he had left on the bridge at the wheel. He did not call to Worrell from the deck before he entered the engineroom, which was directly beneath the wheelhouse (App. 110), nor did he make any attempt to communicate with Worrell via the telephone and speaking tube between the engineroom and the bridge (App. 110). Three other men were in the engineroom with him, Milan, the engineer, Bugoski, the oiler, and Harrington, the deckhand.

The captain first ordered the engines stopped and then astern (App. 103). After about three minutes he looked out of the porthole and saw the fire on the water dying down so he again ordered the engines stopped (App. 296). When the engineer failed to respond to this order, he thought that the engineer had been overcome by smoke and had fallen (App. 104), so he reached over to the con-

1. The tug "Herron" was of all steel construction except for the wheelhouse which was wood (N. T. 7).

trols and stopped the engines himself (App. 104). Captain Taylor then called out, "Everybody overboard!" (App. 104), and without further ado he raced for the engineroom door leaving the others behind him without making any effort to look for the engineer whom he thought had been overcome by smoke and fallen (App. 104-105). Nor did he attempt to communicate with Worrell who was on the bridge and instruct him to abandon ship. When the captain came out of the engineroom the fire on the water had practically burned out, except for an occasional patch (App. 24-30). He dashed to the stern where he found the cook and went overboard with him leaving all the others behind. When the oiler Bugoski and the deckhand Harrington came to the stern, the captain had already swum ashore and was calling to them from the dock to jump overboard (App. 156). They went over the stern and swam ashore without further mishap (App. 156). The bodies of Worrell and Milan were never found, and they are presumed to have perished in the disaster. These claims are by the widows and children of those two seamen.

In the trial court petitioners contended that the vessel was unseaworthy because the open flame lamps constituted a hazard in a petroleum refinery area and were in fact unsafe; that it was also negligence to use such a dangerous appliance, particularly so low and close to the water where the inflammable concentrations of gas were located; that the respondent violated the Coast Guard regulation requiring the light to be carried at least eight feet above the water, which factor was a proximate cause of the accident; that the vessel was also unseaworthy because the captain was not equal in disposition and seamanship to the average man in the calling.

The trial judge denied all of these contentions and completely exonerated respondent from any and all liability in connection with the disaster.

In reaching these conclusions the District Judge failed to make any distinction between negligence and unsea-

worthiness, and expressly considered both these theories of liability as though they were governed by the identical criteria. Judge Kirkpatrick stated that there was no evidence that the river was "considered a danger area so that it would be negligent for a ship to carry open flame lanterns at a height of three feet above the water" (App. 326). Is was solely upon that premise that he held there was no unseaworthiness or negligence.

Regarding the Coast Guard regulation, he found that it had been violated and that the violation was the proximate cause of the disaster; but, he denied liability upon this ground because the injury "was of a kind not contemplated or intended to be guarded against by the regulation" (App. 326).

The decision of the District Judge was affirmed in a per curiam opinion with Judges Maris and Kalodner holding that the fact findings "were not clearly erroneous", and the conclusions of law "were correct". Chief Judge Biggs vigorously dissented upon the ground that he did "not see how a plainer demonstration of unseaworthy appliances could be made." A petition for a rehearing was filed, which was denied without oral argument on the ground that Judges Maris and Kalodner "do not desire rehearing" and Judges Goodrich and Hastie "do not think it appropriate to order rehearing before the court en banc". However, Chief Judge Biggs and Judges McLaughlin and Staley dissented, holding that a rehearing before the court en banc should have been ordered.

Because we consider the court below to be so greatly in error in its failure to apply the warranty of seaworthiness as required by this Court, and also because of its gross error in the interpretation of the Coast Guard regulation, we deem it unnecessary to burden this court with a challenge of the remaining findings, even though they cry out for review.

## REASONS FOR GRANTING THE WRIT.

### 1. The Lower Courts Finding That Fault or Knowledge of a Dangerous Condition is Essential to Establish Liability Under the Warranty of Seaworthiness is in Direct Conflict With the Decisions of This Court in Mahnich v. Southern S. S. Co., 321 U. S. 96, and Seas Shipping Co. v. Sieracki, 328 U. S. 85.

In the *Mahnich* case a seaman was injured when the scaffold upon which he was working fell because one of the supporting ropes parted. The rope had been intended for use in the lyle gun box; however, a section of it had been cut at the direction of the mate for the staging from a coil which was examined and tested by the boatswain and mate and found to be generally sound in appearance. After the accident, examination of the rope at the point where it broke showed that it was rotten and inadequate. The sole ground of liability alleged was a breach of the warranty of seaworthiness. Coincidentally, Judge Kirkpatrick absolved the shipowner in the *Mahnich* case also and his opinion there, as here, was affirmed by a divided Court with Judge Maris and Judge Goodrich constituting the majority and Chief Judge Biggs there, as here, entering a strong dissent. Upon certiorari this Court reversed the majority in the *Mahnich* case, and in so doing, took occasion to expressly reject a line of decisions which confused the criteria of negligence with the warranty of seaworthiness, as the court below did in this case. On this very point, this Court stated (p. 100):

> "In a number of cases in the federal courts, decided before The Osceola, 189 U. S. 158, 47 L. ed. 760, 23 S. Ct. 483, supra, the right of the seaman to recover for injuries caused by unseaworthiness seems to have been rested on the negligent failure, usually by the seaman's officers or fellow seamen, to supply seaworthy appliances. The Noddleburn (DC) 12 Sawy. 129, 28 F.

855 affirmed in (CC) 12 Sawy. 327, 30 F. 142; The Neptuno (DC) 30 F. 925; The Frank and Willie (DC) 45 F. 494; The Julia Fowler (DC) 49 F. 277; William Johnson & Co. v. Johansen (CCA 5th), 86 F. 886; and see The Columbia (DC) 124 F. 745; The Lyndhurst (DC) 149 F. 900. But later cases in this and other federal courts have followed the ruling of The Osceola, 189 U. S. 158, 47 L. ed. 760, 23 S. Ct. 483, supra, that the *exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances.*" (Emphasis supplied.)

In applying the warranty to the facts in that case, this Court further held that liability under the warranty attached even though the failure to observe the dangerous condition was unavoidable (p. 103):

"The staging from which petitioner fell was an appliance appurtenant to the ship. It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used, because of the defective rope with which it was rigged Its inadequacy rendered it unseaworthy, whether the mate's failure to observe the defect was negligent or *unavoidable.* Had it been adequate, petitioner would not have been injured and his injury was the proximate and immediate consequence of the unseaworthiness. See The Osceola, supra (189 U. S. 174, 175, 47 L. ed. 764, 765, 23 S. Ct. 483) and cases cited."

The Court then sets forth the reasoning behind the rule and concludes that the shipowner is under an absolute obligation to provide seaworthy appliances "*when* and *where* the work is to be done" (p. 103):

"We have often had occasion to emphasize the conditions of the seaman's employment, see Socony-Vacuum Oil Co. v. Smith, supra (305 U. S. 430, 431, 83 L. ed. 269, 270, 59 S. Ct. 262) and cases cited, which have

been deemed to make him a ward of the admiralty and to place large responsibility for his safety on the owner. He is subject to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers. These conditions, which have generated the exacting requirement that *the vessel or the owner must provide the seaman with seaworthy appliances with which to do his work, likewise require that safe appliances be furnished when and where the work is to be done.*" (Emphasis supplied.)

In the *Sieràcki* case, a shackle which secured the ten ton boom suddenly parted while hoisting a heavy load, causing the boom to fall and injure one of the men working below. This court held the shipowner liable even though a reasonable inspection could not have discovered the latent defect in the shackle and despite the fact that the shipowner could not anticipate or have avoided the accident. After discussing the considerations upon which the warranty was grounded, this Court pointed out that the absolute character of the duty negates considerations such as fault or knowledge of the dangerous condition (p. 94):

"These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. *It is essentially a species of liability without fault,* analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, *the liability is neither limited by conceptions of negligence nor contractual in character.* Mahnich v. Southern S. S. Co., 321 U. S. 96, 88 L. Ed. 561, 64 S. Ct. 455, supra; Atlantic Transport Co. v. Imbrovek, 234 U. S.

52, 58 L. Ed. 1208, 34 S. Ct. 733, 51 LRA (NS) 1157; Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 66 L. Ed. 927, 42 S. Ct. 475, supra. *It is a form of absolute duty owing to all within the range of its humanitarian policy.*" (Emphasis supplied.)

Judge Kirkpatrick's decision in the instant case, which was affirmed by a bare majority in the Court of Appeals, would overrule the doctrine so lucidly laid down by this Court. Judge Kirkpatrick treated the issues of negligence and unseaworthiness as though they were dependent upon the identical considerations without making any distinction between them. The following excerpt from his opinion shows how erroneously he injected the basic elements of negligence into the warranty of seaworthiness (App. 326):

> "This brings us to the question whether, apart from any question of failure to observe a regulation, there was *common-law negligence* or *unseaworthiness* under the general maritime law. The lanterns carried were open flame kerosene lights of a proper and suitable type. It is true that the Schuylkill River has on its banks several refineries and facilities for oil storage and for loading and unloading petroleum products, but there is no evidence that the river at this point is, or ever has been, *considered* a danger area, so that it would be *negligent* for a ship to carry open flame lanterns at a height of three feet above the water, and I find that there *was no negligence* in doing so." (Emphasis supplied.)

It was this reasoning which the court below adopted in concluding that there was no breach of the warranty of seaworthiness. It is the very reasoning which this Court rejected as being foreign to the warranty, in *Mahnich* and *Sieracki*. The rule adopted by the majority of the court below would change the entire structure of the warranty and emasculate it into an ordinary cause of action for negligence.

The basic characteristics of the warranty are totally different from those which make up a cause of action based on negligence. The factors which the court below used here in measuring the liability under the warranty are completely foreign and unrelated to the warranty and should never have been considered. It makes no difference whether the respondent was or was not negligent, or whether the Schuylkill River was or was not "considered" a danger area, or even whether the respondent by the exercise of reasonable diligence could or could not have discovered the danger area. These are all factors which determine negligence, but have nothing whatsoever to do in determining whether there has been a breach of the warranty. Insofar as the warranty is concerned, it is sufficient to show that there was *in fact* a dangerous condition or that the appurtenances were in fact inadequate or dangerous or defective under the circumstances, and if such be shown, then the shipowner has breached his representation or promise under the warranty.

In the case at bar it is indisputable that the naked flame which was carried on the deck of the barge less than three feet above the water was *in fact* a dangerous and inadequate appliance under the circumstances. This factor alone constituted a breach of respondent's warranty.

The decision of the Court below violates the doctrine laid down by this Court in *Mahnich* and *Sieracki* and it calls for the exercise of this Court's supervisory powers.

**2. The Decision of the Court Below on the Question of Statutory Construction Conflicts With the Decisions of This Court in Davis v. Wolfe, 263 U. S. 239; and Coray v. Southern Pacific Co., 335 U. S. 520.**

Prior to the decision of this Court in the *Davis* case there was some confusion in the cases as to whether liability for personal injury could be imposed upon a carrier for the violation of a regulation where the injury sustained was not

contemplated within the orginal protection of the regulation. In *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S. 243, a switch engine ran into a standing car whose coupler and drawbar had been pulled out. The engine in the absence of these appliances, came into immediate contact with the end of the car, and a switchman riding on the footboard of the engine was caught between it and the body of the car. And in *Lang v. New York C. R. Co.*, 255 U. S. 455, through the failure to stop in time, a string of cars that had been kicked in on a siding, ran into a standing car whose coupler attachment and buffers were gone, and the brakeman on the end on the string of cars was caught between the car on which he was riding and the standing car. In both of these cases it was held that the collision was not proximately caused by the absence of automatic couplers on the standing cars; therefore, the carriers were not liable for the injuries received by the employee, even if the collision would not have resulted in injury to them had the couplers been on the standing cars.

On the other hand in *Louisville & N. R. Co. v. Layton*, 243 U. S. 617, the failure of couplers to work automatically in a switching operation resulted in a collision of cars from one of which a brakeman was thrown while preparing to release brakes, and in *Minneapolis & St. L. R. Co. v. Gotschall*, 244 U. S. 66, a brakeman was thrown from the train as a result of defective couplers coming open while the train was in motion. In these cases the defect in the couplers being in each the proximate cause of the injury, it was held that the employees were entitled to recover.

In the *Layton* case, the Court specifically distinguished the *Conarty* case on the ground that in the latter case the collision resulting in the injury was not proximately attributable to a violation of the Act. All four of these cases, were carefully examined by the Supreme Court in the *Davis* case and from that analysis the Court laid down this rule (p. 243):

> "The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, *although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.*" (Emphasis supplied.)

This Court reaffirmed that doctrine in *Coray v. Southern Pacific Co.*, 335 U. S. 520.

In the instant case, the trial judge expressly found that the respondent violated the regulation by carrying the naked flame lower than the required eight feet above the water. He further found that this violation was the proximate cause of the fire. He then erroneously went on to state: "True, the origin of the fire can be traced to the violation of the regulation, but the question is not causation but whether the violation of the regulation, of itself, imposes liability." He then decided the question in the negative upon the ground that: "It seems to me to be beyond all question that the Coast Guard Regulation had to do solely with navigation and was intended for the prevention of collisions and for no other purpose. In the present case there was no collision and no fault of navigation."

This finding is diametrically opposed to the rule this Court so lucidly laid down in the *Davis* case. So long as there is a breach of a regulation which is the proximate cause of the injury the rule of this Court would impose liability regardless of whether the injury was within the in-

tended protection of the Act. The lower Court's decision would change that rule; a review of that decision is, therefore, imperative.

### 3. The Questions Presented Are of the Utmost National Importance.

The warranty of seaworthiness affects all types of cases, but in particular it has a tremendous impact upon personal injury claims of all seamen including crew members and longshoremen. Thousands of these claims every year are litigated and based upon the warranty. The question presented in this case will affect the vast majority of those cases and its importance cannot be overestimated.

The issue relating to the interpretation of the Coast Guard regulation is, likewise, of substantial national importance. A great percentage of maritime cases are premised upon maritime regulations, and, indeed, the issue extends, inter alia, to a large percentage of cases brought by railroad employees under the Federal Employers Liability Acts, where the safety appliance provisions are involved.

Because of the national import of these questions, it is apparent that the decision below will have an injurious effect on the uniform application of the doctrines enunciated by this Court and it clearly merits a review by this Court.

## CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
*Counsel for Petitioner.*

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 137 of 1953.

IN ADMIRALTY.

## OPINION SUR PLEADINGS AND PROOF.

(Filed Jan. 19, 1956.)

IN THE MATTER OF THE PETITION OF AMERICAN DREDGING COMPANY, AS OWNER OF THE TUG "ARTHUR N. HERRON," FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

KIRKPATRICK, *Ch.J.*

On the evening of November 18, 1952, between 10:00 and 11:00 o'clock, the tug Arthur N. Herron was going down the Schuylkill River, with a tow consisting of a loaded mud scow made up on her port side. As she was passing the refinery of the Gulf Oil Company, the men on board her heard a rumbling sound and, without other warning, the surface of the river around the tug suddenly burst into flames, enveloping the tug and barge in a sea of fire, with flames rising to a height far above the deck of the tug and completely shutting off the view of those on board in every direction. The tug caught fire and portions of it, including the entire wheelhouse, were destroyed.

Two men lost their lives. Their widows, together with at least one of the crew who suffered burns in the fire, have claims for damages against the American Dredging Company, owner of the tug. The matter comes before the Court upon a petition for exoneration from or limitation of liability filed by the Dredging Company.

In proceedings of this nature, the burden of proof is upon the petitioner. If he can show that the disaster was due to no fault of his and no fault on the part of the ship or its crew, he is entitled to exoneration. If he fails to meet this burden or if it appears affirmatively that there was negligence, causing or contributing to the loss, on the part of the master or crew, the limitation phase comes under consideration, and here, fault having been proved, or presupposed from the petitioner's having asked for limitation, the petitioner's burden is to show that the fault was without his privity or knowledge.

The cause of the fire was the ignition of highly inflammable vapor lying above an extensive accumulation of some petroleum product spread over the surface of the river, which was touched off by an open flame kerosene lantern carried on the deck of the scow at its rear port corner.

The lantern was not more than three feet above the water instead of eight feet as required by Section 80.16, subsection (h) *, of the Coast Guard Regulations, and there is evidence, consisting of expert opinion, that the vapor would not have been ignited if the lantern had been carried at a height of eight feet. However, that fact being an element of liability in this case, the claimants were not bound to prove it, but the petitioner had the burden of disproving it, and has failed to do so.

The petitioner contends that section (h) does not cover the case of a barge or scow towed alongside, as was the one which the Herron was towing, but I think that it does. Subsection (e) also deals with alongside tows but expressly applies only to such barges as have deck houses or which are carrying cargo piled so high as to obscure the side lights of the tug. In such case the barges must carry on their outward sides red or green lights corresponding to the light of the tug obscured by the tow, but need not carry any white light.

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* That section prescribes a white light at each end of the barge or scow, not less than eight feet above the surface of the water.

Subsection (h) applies to scows "not otherwise provided for". Alongside tows without obstructing structures or cargo on them are not provided for in section (e) or anywhere else. The mud scow involved in this case had nothing on it except its low-lying cargo of mud, hence, subsection (e) did not apply to it and subsection (h) did.*

However, I am of the opinion that the violation of the Coast Guard regulation in respect of the height at which the lantern was carried does not constitute negligence per se, nor is it evidence of negligence. "A statute or ordinance may be construed as intended to give protection against a particular form of harm to a particular interest. If so, the actor cannot be liable to another for a violation of the enactment unless the harm which the violation causes is that from which it was the purpose of the enactment to protect the other." Restatement, Negligence, Section 286 h, page 756. ". . . if none of the consequences which the statute or ordinance was intended to guard against has ensued from its violation, such violation does not amount to negligence, even though some other injurious consequence has resulted; but in such case the liability, if any, must rest solely on common-law negligence." C.J.S., Negligence, Section 19, page 423.

It seems to me to be beyond all question that the Coast Guard regulation had to do solely with navigation and was

* I cannot accept the petitioner's interpretation of the regulation, which, if carried to its conclusion, would mean that a low-lying barge would not have to carry any light at all. Nor does the testimony of the Coast Guard Chief of Marine Safety for the district support the petitioner's view. There was no evidence of recognition by the Coast Guard of, or its acquiescence in, any practice relating to lights on barges, the fact being that the Coast Guard never made any attempt to enforce any of the regulations relating to lights and imposed no penalties until after a collision or a violation had been reported. The only thing which could possibly be taken as an interpretation by the Coast Guard was the witness's advice to some tugboat owners that subsection (h) applied to barges towed alongside and required two white lights. There was nothing said about the height at which the lights were to be carried.

intended for the prevention of collisions, and for no other purpose. In the present case there was no collision and no fault of navigation. True, the origin of the fire can be traced to the violation of the regulation, but the question is not causation but whether the violation of the regulation, of itself, imposes liability. There seems to be no disagreement among authorities that it does not.

The same considerations apply to unseaworthiness. Whether the violation of the regulation be called negligence or be said to make the flotilla unseaworthy is merely a question of words. In either case the liability stems exclusively from the violation of a regulation designed for a specific limited purpose and in either case the injury was of a kind not contemplated or intended to be guarded against by the regulation.

This brings us to the question whether, apart from any question of failure to observe a regulation, there was common-law negligence or unseaworthiness under the general maritime law. The lanterns carried were open flame kerosene lights of a proper and suitable type. It is true that the Schuylkill River has on its banks several refineries and facilities for oil storage and for loading and unloading petroleum products, but there is no evidence that the river at this point is, or ever has been, considered a danger area, so that it would be negligent for a ship to carry open flame lanterns at a height of three feet above the water, and I find that there was no negligence in doing so. It should be noted that not only are open lights carried, but internal combustion as well as steam engines are used, vessels and tugs have galleys, men smoke aboard the boats and, in addition, many small boats with open lights ply up and down the river. Beside this, the Penrose Avenue bridge with a constant stream of automobiles and pedestrians passing over it spans the river at a point very near that of the accident.

Although I have not predicated liability upon it, it does appear as a fact that there was a violation of a regula-

tion pertaining to lights, and I think that, inasmuch as the case may be appealed, the claimants are entitled to a finding as to the knowledge and privity on the part of the petitioner. Upon this issue, like the other issues, the burden is upon the petitioner to disprove, rather than upon the claimants to prove. The petitioner called one of its captains who was in charge of the tug part of the time and who testified that there was a supply of eight-foot steel rods with lantern arms on board. He like Captain Taylor, never used them when towing a single barge alongside. In view of the length of time during which the tug had been operating, and the number of trips up and down the river it must have made, it is not improbable that the petitioner was aware of the fact that the poles were not used. The petitioner was not an absentee owner but was in the towing business conducting it actively and daily on the Schuylkill River and in the port of Philadelphia. However, still bearing in mind the petitioner's burden, the significant thing is that no officer or employee of the petitioner appeared who denied such knowledge or the opportunity to obtain it. I, therefore, find that the petitioner had knowledge of the statutory violation and was privy to it.

The questions of Captain Taylor's competency and whether or not his conduct during the emergency constituted negligence contributing to the injury remain to be considered.

In critically appraising Captain Taylor's conduct, one should remember that one is attempting to judge a man instantaneously and without warning plunged into a situation of danger of a kind almost unique in peacetime navigation. This was not the case of a fire breaking out on board—even a swiftly spreading fire. Proceeding along a quiet river, the crew of this tug suddenly, probably in less than a second, found themselves practically in the heart of a furnace. The entire episode, from the first burst of

fire until the flames died down to patches on the surface of the river, covered in time not much more than five minutes.*

At the time when the fire began, Captain Taylor was not in the pilot house, having gone to the galley to get a cup of coffee, leaving the wheel in charge of one of the deckhands. The claimants contend that this was negligent, inasmuch as a number of tankers were loading or discharging at the plant of the Gulf Company, showing red lights, indicating that they were handling inflammable or explosive cargo. I do not see how that fact can make the part of the river on which the tug was navigating a "danger area", as the claimants contend. At the time the captain left the bridge, the nearest of the tankers was more than 3400 feet away from the tug, or, in time, something between five and ten minutes. He could have got back to the pilot house in a matter of seconds, and there is no evidence that he was in the galley more than a very few minutes. I cannot see that there was the slightest reason to anticipate any danger from the ocean-going tankers at the Gulf spillways.

Nor can I find negligence in Captain Taylor's maneuvering of the tug after the fire started. What he did was to order the engine stopped, then reversed, and finally, when it seemed to him (as well as to everyone else on board) that the tug was doomed, stop again, with the idea in mind that it would make it safer for the men to jump off from the stern. I do not agree that stopping and backing was wrong. The captain had no idea how great an area of the river was on fire or how far he would have to drive through the flames if he went straight ahead, and it appeared to him that the fire was not quite as solid astern

* Norcross's testimony does not, as the claimants contend, establish the fact that it was a matter of only a minute or so. Norcross's estimate began with the time when his attention was drawn to a glow in the sky, but there is nothing to show that the glow would not have been seen by him before that, had he been looking in that direction.

as it was ahead. I cannot accept the theory of the claimants' expert that this slow-moving tug and barge, if steered straight ahead, would have created a bow wave sufficient to more or less insulate it from the burning surface of the water. Besides, the captain knew that there was nothing directly behind him, and he was unable to see what was ahead of him, so that if he drove ahead there was always the possibility of running his flaming tug into another vessel or a pier or some part of the Gulf Refinery's shore structures. The final stop may have been a mistake but, right or wrong, it was an exercise of judgment in an unprecedented situation and I cannot find negligence in connection with it.

The next point raised by the claimant is that it was negligent to fail to make use of the hose or other fire-fighting apparatus. Closely related to this is the point that the failure to do so was attributable to the fact that no fire drills had ever been held.

The purpose of fire drills is to condition the master and crew to react automatically and immediately to a situation of emergency so that when a fire breaks out the hose and equipment can be put into use without delay. Unquestionably, Captain Taylor was negligent in failing to hold periodic fire drills and it could probably be said that this rendered the ship unseaworthy. Certainly, that was an omission which cannot be excused upon the grounds of the sudden emergency with which the captain was faced. However, I am convinced that his negligence and the tug's unseaworthiness, due to the crew's lack of training in this particular, could not have had anything to do with the loss, for the reason that there never was the slightest chance of making any effective use of the equipment.

Of course, the bursting into flame of the surface of the water can be properly described as a fire, but it came closer to being an explosion than any ordinary fire. There was literally nothing for the men to do but run to the engine-

room and close the hatches. The heat outside must have been humanly insupportable. The testimony is that at ship's side the temperature was 1800 to 3800 degrees Fahrenheit. None of the men were able to stay on the deck much over half a minute. Captain Taylor testified "Well, it was just like a furnace. You couldn't stand out on deck that long to find out how hot it was. It was just like a large blowtorch, it seemed like to me." Bugoski, the oiler, who was in the engineroom looking out a porthole, said "I felt a hot flash hit me right in the face", and Harrington, a deckhand, described the flames as so high that he could not see the top of them. At one time when the men were in the engineroom, Captain Taylor attempted to get onto the barge but was driven back "as soon as I opened the port door, and the flames shot right in my face . . . I had to close the door right away." This, it may be noted, was on the port side, partially, at least, protected by the barge. I conclude that, even with a perfectly trained crew, no one could have remained on the deck of the tug, or even on the barge, long enough to have used the fire hose with any appreciable effect before it went out of commission. Obviously, if this is so, the lack of fire drills was not a factor in the loss.

I cannot fix blame upon the captain for failing to rescue Worrell or Mylan. Mylan was in the engineroom with him. The place was filled with stifling, oily smoke and it was impossible for one man to identify another. All that could be seen were dim figures. As a matter of fact, the evidence indicates that Mylan did not remain in the engineroom but jumped overboard with the others when the tug was abandoned. It was plainly impossible to get to Worrell in the wheelhouse.

There are a number of other things which it is argued that the captain should have done. I do not think it is necessary to go into detail, and I shall only say that I do not find any negligence in any of them on the part of the captain or, at least, any negligence which caused or contributed to the loss.

There is no dispute about the principle of law, on which another branch of the claimant's case is grounded, namely, that the owners of a vessel, as part of their warranty of seaworthiness, are bound to provide a competent master for the vessel. "Applied to a seaman, such a warranty is, not that the seaman is competent to meet all contingencies; but that he is equal in disposition and seamanship to the ordinary men in the calling", Keen v. Overseas Tankship Corp., 194 F. 2d 515, 518. This statement of the law, of course, includes masters of vessels as well as ordinary seamen, the only difference being that the master's abilities must measure up to those of the ordinary master of a similar vessel, in this case the ordinary tugboat captain.

The claimants contend not only that the petitioner has failed to meet the burden of showing Captain Taylor's competency but the evidence clearly discloses his incompetency. Although only 26 years old at the time of the accident, Captain Taylor had five years experience as a tugboat captain in the port of Philadelphia. From the time he was 16 years old he had been working on and about ships of various kinds. This, I think, is prima facie evidence that he was a competent officer and is sufficient to meet the petitioner's burden. The claimants produced no evidence of anything in Captain Taylor's past record unfavorable to him or his seamanship. They rely entirely upon their position that his conduct immediately before and during the emergency sufficiently proves that he was an incompetent ship's officer, and they invoke the principle of Boudoin v. Lykes Brothers Steamship Co., Inc., 348 U. S. 336. That was a far-reaching decision, and it follows from it that if the evidence is strong enough, an officer can be found, from his handling of a single situation, to have been incompetent, and the Court can make a finding that his employment was a breach of the warranty of seaworthiness, without proof of anything else—either of his record as a seaman, his background, his training or his personal qualities.

The precise standard of seamanship required as laid down in the decisions should be carefully borne in mind. In In re Pacific Mail S. S. Co., 130 F. 76, 82, quoting the opinion in In re Meyer, 74 F. 881, 885, the Court noted that the crew must be adequate and competent " 'with reference to all the exigencies of the intended route'; not merely competent for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen, . . .". Is it evidence from which it can be found that the master of a tug was incompetent and unfit or not equal in disposition to the ordinary man of his calling that he failed to act with heroism or with complete efficiency in the kind of emergency which occurred on the tug Herron? "All the exigencies *of the intended route*" and "any exigency *that is likely to happen*" do not quite cover what Captain Taylor had to meet. Certainly he was frightened and confused. So was everybody on the tug and so, I venture to say, would have been anyone, except a man of courage and resourcefulness far above and beyond that of an officer "equal in disposition and seamanship to the ordinary men in the calling", which is all that the law requires. Certainly Captain Taylor did not adhere strictly to the traditions of the sea when he was the second man to jump overboard. However, it is much easier to apply the logic of calm afterthought than to place one's self in the position of men suddenly confronted with the prospect of imminent death in a flaming tugboat.

In the light of all these considerations, I cannot find that Captain Taylor's conduct in the few minutes involved in the disaster can form any basis for the conclusion that he was less competent than the ordinary man in the calling of a tugboat captain.

From what has been said, it follows that the petitioner is entitled to exoneration.

Decree accordingly.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,869

IN THE MATTER OF THE PETITION OF AMERICAN DREDGING COMPANY, AS OWNER OF THE TUG "ARTHUR N. HERRON", FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

WILLIAM J. KERNAN, ADMINISTRATOR OF THE ESTATE OF ARTHUR E. MILAN, AND JOHN J. MEEHAN, ADMINISTRATOR OF THE ESTATE OF DONALD H. WORRELL,
*Appellants*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 4, 1956

Before BIGGS, *Chief Judge,* and MARIS and KALODNER, *Circuit Judges.*

## OPINION OF THE COURT

(Filed July 5, 1956)

PER CURIAM:

This is an appeal by two claimants from a final decree of the District Court for the Eastern District of Pennsylvania exonerating the American Dredging Company, as

owner of the tug "Arthur N. Herron", from all liability for loss, damage, destruction, death or injury arising from or growing out of a fire which occurred on November 18, 1952 on the Schuylkill River in the city of Philadelphia. On the evening of that day the tug was going down the river with a tow consisting of a loaded mud scow made up on her port side. As she passed the refinery of the Gulf Oil Company, the men on board her heard a rumbling sound and, without other warning, the surface of the river around the tug suddenly burst into flames, enveloping the tug and barge in a sea of fire, with flames rising to a height far above the deck of the tug and completely shutting off the view of those on board in every direction. The district court found that the cause of the fire was the ignition of highly inflammable vapor lying above an extensive accumulation of some petroleum product spread over the surface of the river which was touched off by an open flame kerosene lantern carried on the deck of the scow at its rear port corner. Two members of the crew of the tug lost their lives in the disaster. The administrators of these men and a surviving crew member who suffered burns made claims for damages against the American Dredging Company as owner of the tug. That company thereupon filed the petition for exoneration from liability which is the basis for the present proceeding.

The district court properly held that in order to entitle it to exoneration the burden of proof was upon the petitioner to show that the disaster was not due to its fault or the fault of the master or crew or the unseaworthiness of the vessel. The claimants asserted that the petitioner was negligent in maintaining the open flame lantern on the deck of the scow at less than a safe height above the water in a potentially dangerous area and in failing to provide a safer lamp and that the vessel was thereby rendered unseaworthy. They also contended that the failure of the captain of the tug to obey the Coast Guard regulation which

required the scow to carry its lights at each end not less than 8 feet above the surface of the water was negligence per se and rendered the vessel unseaworthy. Finally they urged that the tug was unseaworthy because the petitioner had not provided her with a master who was equal in disposition and seamanship to ordinary men of the calling, his conduct having in fact contributed to the loss of life.

In a carefully reasoned opinion Chief Judge Kirkpatrick, who presided at the hearing in the district court, discussed all of these contentions in the light of the evidence, made findings of fact and concluded that the petitioner had sustained its burden of establishing that both it and the master and crew of the tug were free from negligence and that the tug and tow were not unseaworthy. He accordingly granted the petition for exoneration. F. Supp. . Our consideration of the evidence satisfies us that his fact findings were not clearly erroneous. We think that his conclusions of law were correct, for the reasons sufficiently stated in his opinion.

The decree of the district court will accordingly be affirmed.

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BIGGS, *Chief Judge*, dissenting.

The petitioner, American Dredging Company, which seeks exoneration from liability, by its tow boat "Herron" towed a scow with two open-flame kerosene lamps on its deck about two and a half feet above the water into an area near which seven tankers were moored in the Schuylkill River, engaged in loading or discharging liquid petroleum. A conflagration instantly ensued, and two members of the "Herron's" crew lost their lives and a third was injured severely. The majority of this court hold that the barge so equipped was seaworthy.

Petroleum products frequently are inflammable and on occasion have been ignited by open flame. For this reason it would seem that the equipment of the barge was inadequate. In fact I do not see how a plainer demonstration of unseaworthy appliances could be made. For this reason I dissent.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,869

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WILLIAM J. KERNAN, ADMINISTRATOR OF THE ESTATE OF ARTHUR E. MILAN, AND JOHN J. MEEHAN, ADMINISTRATOR OF THE ESTATE OF DONALD H. WORRELL,

*Appellants*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, *Chief Judge*, AND MARIS AND KALODNER, *Circuit Judges*.

## JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decree of the said District Court in this case be, and the same is hereby affirmed with costs.

July 5, 1956.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,869

IN THE MATTER OF THE PETITION OF AMERICAN DREDGING COMPANY, AS OWNER OF THE TUG "ARTHUR N. HERRON", FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

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*Appellants*

ON PETITION FOR REHEARING

Before BIGGS, *Chief Judge*, AND MARIS, GOODRICH, MCLAUGHLIN, KALODNER, STALEY AND HASTIE, *Circuit Judges*.

**OPINION OF THE COURT**

(Filed August 13, 1956)

PER CURIAM:

A petition for rehearing has been filed by the appellants in this case. Since the judges who concurred in the judgment entered on July 5, 1956 do not desire rehearing and a majority of the circuit judges of the circuit do not think it appropriate to order rehearing before the court in banc, the petition for rehearing will be denied.

BIGGS, Chief Judge, and MCLAUGHLIN and STALEY, Circuit Judges, think that rehearing before the court in banc should be ordered.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,869

IN THE MATTER OF THE PETITION OF AMERICAN DREDGING COMPANY, AS OWNER OF THE TUG "ARTHUR N. HERRON", FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

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*Appellants*

**ORDER SUR PETITION FOR REHEARING**

Present: BIGGS, *Chief Judge*, AND MARIS, GOODRICH, MCLAUGHLIN, KALODNER, STALEY AND HASTIE, *Circuit Judges*.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

Dated: August 13, 1956.

## TITLE 46 U. S. C. A. SECTION 688

**Section 688. Recovery for injury to or death of seaman**

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, Sec. 20. 38 Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007.

## COAST GUARD REGULATION

### Federal Register Title 32, Chapter 1, Subchapter D, Part 80.16(h)

80.16 Lights for Barges, Canal Boats, Scows, and Other Nondescript Vessels on Certain Inland Waters on the Atlantic and Pacific Coasts.—

* * * * *

(h) Scows not otherwise provided for in this section on waters described in paragraph (a) of this section shall carry a white light at each end of each scow, except that when such scows are massed in tiers, two or more abreast, each of the outside scows shall carry a white light on its outer bow, and the outside scows in the last tier shall each carry, in addition, a white light on the outer part of the stern. The white light shall be carried not less than 8 feet above the surface of the water, and shall be so placed as to show an unbroken light all around the horizon, and shall be of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least 5 miles.